provisions in shaping the 1917 amendments, and that the requirement of joining the wife, as modified by the proviso that the deed could be avoided only within one year, was intended to make the husband's sole deed voidable and not void.[21] Unless there is an entire abandonment of the ground taken in former decisions, it is difficult to see how the California courts[22] can accept the holding of Blum v. Wardell as to the nature of the wife's interest.[23]

L. E. K.

CONTRACTS: PAYMENT OF INCREASED PRICE FOR MANUFACTURED ARTICLES — LACK OF CONSIDERATION — In *Western Lithograph Company v. Vanomar Producers*[1] the plaintiff company sought to recover on a subsequent promise of the defendant to pay an increased price for goods already contracted for. Justice Olney denied recovery and in so doing undoubtedly followed the weight of authority both in our own state[2] and throughout the country.[3] In this case, however, there was no question of coercion and both plaintiff and defendant acted voluntarily upon motives of fair dealing, making the new agreement to meet increased cost of production, and the question arises as to the policy of the law, in a case of this character, in refusing to recognise and carry out the expressed intention of the parties to a contract. In other words, admitting that the original contract could have been extinguished by mutual act of the parties and a new one substituted,[4] or that by altering the terms of the defendant's performance, however

[21] In every community property state the husband alone can dispose of the community personal property. In Texas and Nevada the husband alone can even dispose of the community real property.

[22] Certain decisions of the state Supreme Court subsequent to the principal case clearly indicate that there has been no change in the theory of the wife's interest in community property. In Badover v. Guaranty Trust & Savings Bank (Aug. 29, 1921) 62 Cal. Dec. 273, the court definitely states that the wife has no existing property right in the community property, and any change in this settled rule of property could be made only by express legislation thereon.

[23] Under Treasury Decisions No. 3071, dated Sept. 18, 1920, and No. 3138, dated March 3, 1921, it is held that in all the community property states, except California, the husband and wife may render separate income tax returns and each report as gross income one-half of the income which under the law of the state constitutes community property. It is also held that in each of these states there shall be included, in computing the federal estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein. These rulings apply also to income and estate tax acts prior to the Revenue Act of 1918.

[1] (March 28, 1921) 61 Cal. Dec. 425, 197 Pac. 103.

[2] Cal. Civ. Code § 1605; Benedict v. Green Robbins Co. (1915) 26 Cal. App. 468, 147 Pac. 486; Pacific Railways Advertising Co. v. Carr (1916) 29 Cal. App. 722, 157 Pac. 529, L. R. A. 1917 C843n; Sullivan v. Sullivan (1893) 99 Cal. 187, 33 Pac. 862; Main Street and Agricultural Park Railroad Co. v. Los Angeles Traction Co. (1900) 129 Cal. 301, 61 Pac. 937.

[3] 1 Williston on Contracts § 130; Alaska Packers' Association v. Domenico (1902) 117 Fed. 99, 54 C. C. A. 445; 34 L. R. A. 33-44, note; Shriner v. Craft (1910) 166 Ala. 146, 51 So. 884, 139 Am. St. Rep. 19, 28 L. R. A. (N. S.) 450.

[4] Cal. Civ. Code § 1689; 3 Williston on Contracts § 1826.

slightly, the second agreement would have been made binding,[5] why cannot such extinguishment and substitution be implied from the manifest intent of the parties in making the subsequent agreement?

We are led to this inquiry by Justice Olney's expressed regret at having to decide as he did in the face of the apparent justice of the plaintiff's claim. We suggest that a distinction might well be drawn between cases where duress has been used, where the promisor has been practically forced into his secondary agreement by the threats of the other to repudiate, and cases like the one presented, where the promisor acted voluntarily upon considerations of fairness.

This suggestion is based upon the theory that the neglect or refusal to recognise such a distinction, instead of encouraging parties to perform their contracts, will be more apt to discourage all hopes of settlement and lead them, when unforseen difficulties arise, to repudiate their obligation and leave the other party to an action for damages; that it will tend to destroy any spirit of compromise and lead to increased distrust and litigation.

That such will be the result and that such a distinction as the above should be adopted is the earnest opinion of Professor Arthur L. Corbin[6] and he illustrates the doctrine by cases representing the two extremes. One,[7] a case similar in principle to our own, where the plaintiff had done his best and had reached a point where lack of credit was preventing his further performance, in which case, Professor Corbin says, "It is not too much to say that the moral sense of the community would be shocked by allowing the defendant to break his new promise." The other,[8] a case in which the promise was extorted from the defendant by threats and other inexcusable conduct. The same author also suggests that this is the real distinction drawn in the Minnesota case[9] cited by plaintiff in the principal case, rather than the distinction between mistake of existing facts and of future difficulties, as was held. There are other cases and authorities which have approved this distinction.[10]

W. N. K.

The suggestion made in the foregoing note could be carried out without introducing a single new principle into our system of law, or opening the door to laxity or sentimentality. It is generally held that in order to make the new contract binding in the case of successive promises, it is necessary to find a measurable interval, however slight, within which the old contract is no longer operative and the new contract has not yet come into existence. It is evident

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[5] 1 Williston on Contracts § 131b.

[6] 27 Yale Law Journal, 362.

[7] Monroe v. Perkins (1830) 9 Pick. (Mass.) 305, 20 Am. Dec. 475.

[8] Lingenfelder v. Wainwright Brewing Co. (1890) 103 Mo. 578, 15 S. W. 844.

[9] King v. Duluth, M. and N. Railway Co. (1895) 61 Minn. 482, 63 N. W. 1105.

[10] Supra, n. 6, at p. 373, note 21.

that such a requirement could soon be reduced to a mere formality. There is, however, a form of agreement in which one obligation supersedes another immediately and, as it were, *ex proprio vigore.*[11] That is the case of novation. At common law, a novation properly is the substitution of a new creditor or a new debtor. At the civil law this is only one type of novation and the least characteristic type. The commoner form is that in which the parties remain the same and a new obligation is created. This is likewise recognized as a form of novation in some common-law jurisdictions, although the annotator in Lawyers Reports Annotated quite overstates the facts when he asserts that such recognition is general.[12] It is enough, however, for our purposes, if good authority supports this use of novation. In California indeed, a novation is defined by the Code in the Civil Law sense.[13]

Obviously there is no more difficulty in assuming that the old contract has been discharged and the new one immediately created when the novation is of the one type, than when it is of the other. In that case the new contract would be subject to the same rules as any other. If it can be attacked for fraud, duress or mistake, that fact will render the contract voidable. The only difficulty would be in making the term "duress" cover this form of economic coercion.

Threats directed against property may, of course, amount to duress. If A forced the consent of B by threatening to set fire to his house, there would be no question that the contract is voidable. But if A threatens to break his contract with B, and thereby forces B into another and disadvantageous contract to himself, apparently that is not duress. The California Code defines menace as a threat of unlawful and violent injury to property. It is plain that only an extreme stretching of these terms will enable them to cover a threat to break a contract, even though an interest in a contract is readily enough included in the term "property." It seems very probable that the code was contemplating duress of goods yet it is hard to see why one act is not as much an overpowering of the will as the other.

At the civil law and at the Roman law, the question would not arise in the same way. Since consideration is not required as a requisite to the validity of a contract, mutual rescission and the creation of a new obligation with different terms offer no difficulty. The intention to novate cannot be presumed, but if evidence of such intention is present the new contract would at once supersede the old one.[15] And that the form of coercion which consists in threatening a breach of contract would be recognized at the civil law, seems indicated by the case cited in Planiol. In that case a

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[11] Williston on Contracts, § 114, § 1865, § 1866.
[12] 12 L. R. A. (N. S.) 1134.
[13] Cal. Civ. Code § 1531 (1).
[14] Cal. Civ. Code § 1570 (2).
[15] Code Civil, Art. 1273, "La novation ne se présume point."

merchant fearing bankruptcy compelled his employees to make a donation to the concern by threatening to discharge them. That, of course, is doing no more than threatening to break his contract. The court held that this was force and that the donation was voidable.[16]

So long as the courts feel bound to apply the existing rule, even in cases where the intention of the parties is clear and the change of terms is dictated by equitable considerations, lawyers and business men must adjust themselves to that rule. Probably the simplest way to satisfy the formal requirement of a change in the consideration is for the manufacturer to promise to transfer or actually to transfer an article of small value, such as a jackknife, as well as to perform the work originally agreed upon. The common law insistence that there must be some consideration will then be countered by its stern refusal to appraise consideration, and uncompromising legal logic be hoisted by its own petard.

M. R.

CORPORATIONS: ACTION ON STOCKHOLDER'S LIABILITY: JUDGMENT AGAINST CORPORATION AS EVIDENCE—In *Ellsworth v. Bradford*[1] the plaintiff sued to enforce against certain corporate stockholders the statutory liability prescribed by section 322 of the Civil Code, alleging that the corporation had converted his stock. It was held that a prior judgment in conversion against the corporation was admissible as prima facie but not conclusive evidence in the plaintiff's behalf. This is the first case in California which definitely holds a prior judgment against the corporation admissible in an action under section 322, as in reviewing earlier cases[2] where such judgments had been admitted by the trial court, the Supreme Court did not pass upon the correctness of this ruling.

It is a universal rule that a judgment binds only parties or privies thereto[3] and where offered in evidence against a stranger will be excluded as *res inter alios acta*.[4] Nevertheless it has been held in many states that a prior judgment against a corporation is admissible and conclusive against the stockholder.[5] Usually the

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[16] 2 Planiol, Traité El. de Droit Civil (8th ed.) § 1072. 2 Dalloz (1893) 359, decision of the court of Bastia.

[1] (June 22, 1921) 62 Cal. Dec. 1, 199 Pac. 335.

[2] McGowan v. McDonald (1896) 111 Cal. 57, 43 Pac. 418; Mitchell v. Beckman (1883) 64 Cal. 117, 28 Pac. 110.

[3] Wigmore on Evidence § 1348, Subd. 2, a; Black on Judgments (2d ed.) § 600.

[4] Jones on Evidence, § 588.

[5] Inhabitants of Brewer v. Inhabitants of Gloucester (1817) 14 Mass. 216; Donworth v. Coolbaugh (1857) 5 Iowa 300; Steffins v. Gurney (1900) 61 Kans. 292, 59 Pac. 725; Miliken v. Whitehouse (1860) 49 Me. 527; Holland v. Duluth (1896) 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Heggie v. Peoples' etc. Assoc'n. (1890) 107 N. C. 581, 12 S. E. 275; Wilson, McElroy & Co. v. Stockholders of Pittsburg Coal Co. (1862) 43 Pa. St. 424; Willoughby v. Chicago Junction R. Co. (1892) 50 N. J. E. 656, 25 Atl. 277; Castleman v.